IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR.JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 6TH NOVEMBER 2007 / 15TH KARTHIKA 1929

RCRev..No. 273 of 2004()

RCA.71 & 73/2002 of Ist ADDL.DISTRICT COURT, KOZHIKODE
RCP.145/1999 of PRL.M.C.KOZHIKODE-II.
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REVISION PETITIONER: APPELLANT/RESPONDENT:

PUTHUKUDI ARIYAKKAL SUFFARULLAKHAN,
FEROKE AMSOM, NALLUR DESOM, KOZHIKODE.

BY ADV. SRI.M.C.SEN
SRI.M.P.SREEKRISHNAN
SMT.SHAHNA KARTHIKEYAN

RESPONDENTS: RESPONDENTS/APPELLANT AND PETITIONER:
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1. AYISHAKUTTY,
D/O. PUTHUKUDI ARIYAKKAL IMBICHIKOYA,
RESIDING AT FEROKE AMSOM, NALLUR DESOM OF
KOZHIKODE TALUK.

2. IMBICHAYISHA, D/O. PULIYALI ATHAN,
RESIDING AT FEROKE AMSOM, NALUR DESOM,
KOZHIKODE TALUK.

BY ADV. SRI.K.B.MUHAMED KUTTY
SRI.K.M.FIROZ
SRI SATHISH NINAN B/O

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON 06/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. Balakrishnan Nair &
T.R. Ramachandran Nair, JJ.

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and was dependent on the said respondent. Therefore, the said respondent wanted the room for his son's bonafide occupation. The tenant is in possession of another building which is reasonably sufficient for running his business. Therefore, eviction was sought under Section 11(4)(iii) of the Act also.

4. The tenant filed a reply statement contending that under an oral agreement the room was rented out to him on a monthly rent of Rs.250/-. He also made a deposit of Rs.20,000/- as advance. He is a tenant conducting stationery business in the schedule room. The rent was being deposited in a 'nithianithi' account of the first respondent opened with the Service Co-operative Bank, Ramanattukara. The claim for arrears of rent is unfounded and he has cleared all the amounts due. The claim for own occupation of the son of the second respondent herein is not bonafide, according to the tenant. The allegation in the Rent Control Petition that the tenant is in possession of another premises, was denied by him.

5. The Rent Controller raised the necessary issues. From the side of the landladies, Pws.1 to 5 were examined and Exts.A1 to A11 were marked. From the side of the tenant, Rws.1 and 2 were examined and Exts.B1 to B11 were marked. Ext.C1 is the Commissioner's report marked as court exhibit. The Rent Controller rejected the claim under Section 11(2)(b) and

allowed the petition under Sections 11(3) and 11(4)(iii) of the Act. The tenant appealed against the findings under Sections 11(3) and 11(4)(iii) of the Act. The landladies appealed against the finding under Section 11(2) (b) of the Act. The appeal filed by the landladies was allowed and the appeal of the tenant was dismissed. Challenging those orders, this revision is filed.

6. Learned Senior Counsel Shri M.C. Sen, appearing for the petitioner herein, attacked the appellate judgment on the following grounds: (i) According to the learned Senior Counsel, the arrangement between the parties being a licence, the Rent Control Petition was not maintainable. The landladies, in the notice issued by them, thereafter in the Rent Control Petition and also during evidence, claimed that the arrangement is a licence. Though the tenant has contended in his reply notice and counter statement that the arrangement is lease, the jurisdiction of a court has to be decided with reference to the pleadings in the plaint and in this case, in the Rent Control Petition, it is submitted. If that be so, the Rent Control Petition was not maintainable. Though, this is not a point raised or considered by the original or appellate authority, it being a pure question of law, it can be raised at any stage and therefore this court may dismiss the Rent Control Petition, it is contended. (ii) According to the tenant, the admitted rent was

Rs.250/-. The landladies claimed that it was Rs.650/-. But the appellate authority made its own calculation and fixed the rent as Rs.450/- per month. The appellate authority is bound to go by the agreement of lease and it cannot fix the rent for a tenanted premises, it is submitted. The Rent Controller rightly relied on the records maintained by the Panchayat where the rental value recorded was Rs.250/- and arrived at a prima facie finding. The same was reversed by the appellate authority on erroneous grounds, it is submitted. (iii) Thirdly, it is submitted that the eviction under Section 11 (3) of the Act was ordered without any evidence on record. (iv) Fourthly, it is contended that the building stated to be in the possession of the revision petitioner/tenant was in fact in the possession of his father and his father was doing business there. So, there is no evidence on record to find that the revision petitioner is in possession of the same. So, this finding is also untenable. Learned Senior Counsel in support of his submissions, relied on the decisions of the Apex Court in **Harshad Chiman Lal Modi v. DLF Universal Ltd.** (2005 (4) KLT SN page 93, case No.125), **Dhruv Green Field Ltd. v. Hukam Singh and others** ((2002) 6 SCC 416) and **Isabella Johnson v. Susai (**1990 (2) KLT 968).

7. Learned counsel for the respondents herein, Shri K.M. Firoz, met

the contentions of the learned Senior Counsel in the following manner: The mere nomenclature of the arrangement between the parties as licence, will not make it a licence. The distinction between licence and lease is well settled. In a licensed premises, the owner keeps the possession and the licensee is permitted to do something which would otherwise be illegal, but for the permission. In this case, there is no pleading regarding the retention of possession or lack of exclusive possession to the tenant. In fact, the tenant was in exclusive possession and the rent was being paid. Therefore, the contention in the reply notice of the tenant was accepted and treating the arrangement as a rental arrangement of the building, the petition before the Rent Control Court was filed. The mere mentioning of the word 'licence' or 'fee' will not oust the jurisdiction of the Rent Controller. There is no inherent lack of jurisdiction in this case, as the area in question is a notified area under the Act. Whether the arrangement in relation to a particular building is lease or licence, is a mixed question of fact and law. Based on the conduct of the parties, it is evidently a lease, though the landladies have used the word 'licence' in their pleadings and evidence. So, learned counsel submitted that the Rent Controller has jurisdiction. In support of the said submission, learned counsel for the respondents relied on the decisions of the Apex Court in **C.M. Beena and another v. P.N. Ramachandra Rao**

((2004) 3 SCC 595) and **Abdulla Bin Ali and others v. Galappa and others** (AIR 1985 SC 577).

8. On the question of arrears of rent, learned counsel for the respondents submitted that the appellate authority entered the finding relying on the evidence of RW.1 and Ext.B1 pass book produced by him. The pass book was that of 'nithianithi' account in the name of the first respondent herein with the local co-operative bank. The said pass book would show that the tenant was to deposit Rs.15/- per day for 365 days in a year, in the account of the first respondent herein. Therefore, the appellate authority took the view that the daily rent is Rs.15/-. So, for 30 days, the rent must be Rs.450/-. The said finding is evidently a finding of fact and it cannot be treated as a rent fixed by the appellate authority de hors the terms of the agreement.

9. Learned counsel for the respondents also supported the concurrent finding of the authorities below under Section 11(3) of the Act. The evidence of P.W.3, which remains unshattered in the cross examination, alone is sufficient to prove the requirement of bonafide need under Section 11(3), it is submitted.

10. Regarding the finding under Section 11(4)(iii) of the Act, it is submitted that the appellate authority relied on three circumstances to

support its finding. One is that the notice was served at the address of the shop room where the tenant runs an aquarium, and was received by him. In the reply notice sent by the tenant, he does not have a case that the room is in the possession of his father. In the counter statement also no such plea was raised. These circumstances are relied on by the appellate authority. There is nothing illegal or improper in the finding of the appellate authority on the ground under Section 11(4)(iii), it is submitted by learned counsel.

11. We have gone through the evidence on record and the pleadings of the parties and also perused the decisions cited by both sides. Learned Senior Counsel is right in his submission that a pure legal question which affects the jurisdiction of the court, concerning the subject matter, can be raised at any point of time, even before the Apex Court for the first time. This submission is fully supported by the decision in **Harshad Chiman Lal Modi's** case (supra). Further, the jurisdiction of the court has to be decided based on the pleadings in the plaint/petition. It is also true that the question of jurisdiction which is a pure question of law, can be raised even if there is an earlier decision to the contrary concerning the same subject matter between the same parties. In other words, the concept of res judicata cannot be pressed into service to prevent raising of such a plea. These propositions

are supported by the decisions cited by the learned Senior Counsel. But in this case, we notice that the above point was not taken before the Rent Controller or the appellate authority. It is being raised for the first time. So, we heard the learned counsel for the respondents on this contention on merits. We have already noticed his contentions on this point and he also submitted that the respondents do not have a case that it is a licence. They admit that it is only a lease arrangement. We notice that the landladies, after realising the stand of the tenant in his reply notice, decided in effect, not to pursue their claim of licence by moving the civil court, but reconciled to the fact that the jural relationship is a rent arrangement and therefore they filed a petition before the Rent Controller. We also find considerable force in the submission of the learned counsel for the respondents that the mere nomenclature is not decisive. Having regard to the terms of the arrangement and the conduct of the parties, the transaction in question is a tenancy arrangement. So, we are of the view that though the landladies have used in their pleadings and evidence the word 'licence', by their conduct they have accepted that the arrangement is a lease arrangement and therefore the Rent Controller has jurisdiction to entertain this matter. So, the preliminary objection raised on behalf of the revision petitioner is rejected.

12. On the question of arrears of rent, the Rent Controller relied on

the rental value noticed in the records maintained by the local Grama Panchayat. The computation of the rental value for levying the tax is not relevant to decide what is the actual rent. In this case, we feel that the finding of the appellate authority relying on the evidence of RW.1 and Ext.B1, is a plausible view on the facts. We agree with the contention of the learned counsel for the respondents on this aspect, which we have already noticed earlier. The said finding cannot be described as perverse or based on no evidence warranting interference by this court.

13. We find that the evidence of P.W.3 establishes his bonafide requirement of the building. His evidence is remaining unshattered in the cross examination. So, the contention of the learned Senior Counsel that the finding under Section 11(3) of the Act is based on no evidence, cannot be accepted. Regarding the finding under Section 11(3) of the Act, no other points were urged before us. On the finding under Section 11(4)(iii) also, we are inclined to accept the contention of the learned counsel for the respondents herein, which we have already noticed above. The appellate authority, on the basis of the materials on record including court exhibit C1, the board in the road which led to the aquarium run by the tenant, the fact of receipt of notice in the said address and the non-mentioning of ownership of the said premises as belonging to his father in the reply notice and in the

counter statement, arrived at a finding. The contention of the learned Senior Counsel that a party has been served a notice at a particular address, may not be conclusively prove that he is in possession of a premises is true. But the cumulative effect of the circumstances relied on by the appellate authority points to the fact that the revision petitioner/tenant is in possession of the said premises. At any rate, it is a plausible view on the facts or it cannot be described as perverse or something which no man in the senses, will arrive at. So, the contentions against the finding under Section 11(4) (iii) of the Act is also rejected.

In the result, the Rent Control Revision fails and it is dismissed.

No costs.

(K. Balakrishnan Nair, Judge.)

(T.R. Ramachandran Nair, Judge.)

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